ERISA preemption case from Vermont, NASHP website, June 3, 2015

Are We There Yet? An Update on Gobeille v. Liberty Mutual

By Alice Weiss and Trish Riley June 2nd, 2015

Summer is the season of the great American road trip, and as such the clarion call from back seats everywhere– Are we there yet? – will soon ring out across the nation. But, this summer for those in Vermont the call has a different meaning.

In a May NASHP Health Policy Blog post, as the Supreme Court was considering hearing Vermont's ERISA preemption case, *Gobeille v. Liberty Mutual*, we noted that Vermont and other states are waiting to see whether the case will result in new limits on states' ability to collect all-payer claims database (APCD) data from self-insured employer-sponsored health plans. Two weeks ago, the U.S. Solicitor General weighed in on the case, encouraging the Court to hold off on hearing the case. For Vermont, the trip will be a little longer, and the uncertainty about states' ability to require self-insured plans to submit needed data remains.

The government's brief includes some good news for Vermont, arguing that the Second Circuit got it wrong in finding that ERISA preempted Vermont's APCD law for third party administrators of self-insured plans. In its argument, the Solicitor reasoned that there was a "significant difference" between the purpose and focus of Vermont's law and ERISA's reporting requirements. While ERISA's requirements are to prevent mismanagement of plan funds and ensure that plan benefits are paid, Vermont's law is designed to "assess and improve healthcare outcomes for Vermont residents." The government goes on to argue that, because there is no evidence that Vermont's data reporting law would create any substantial burden or require substantial changes in administration for the ERISA plan administrator, there should be no ERISA preemption.

Ultimately, the United States' brief argues against the Supreme Court hearing the case. First, the government argues there is not enough of a direct conflict with prior Supreme Court ERISA precedent or between the Circuit Courts of Appeal to warrant a hearing. Second, the government writes that although the issue presented is important, it is not yet ripe for Supreme Court review because no other Appellate Courts have yet considered ERISA's preemption of similar laws. The brief instead urges the Court to wait for the issue to be heard by other courts so a greater body of information can inform review.

The silver lining offered to Vermont and other states was the government's recognition that states are "uniquely positioned to improve quality of care and to control costs through the collection and publication of claims data" using APCDs, a role that does not now exist or could be easily replicated at the federal level. And the brief affirmed that Vermont was raising an

issue of national importance, saying that collection of health care claims data is vital to supporting state and federal delivery system reform efforts.

The government's argument also signals a long road ahead for Vermont and other states, suggesting that states may have to wait several years for the ERISA preemption question to be considered and decided in other federal courts. States with laws creating APCDs exist within the 1st, 4th, 6th, 8th, 9th, and 10th Federal District Court Circuits – any of which could see challenges much like Vermont's in the years ahead. Should such a challenge result in a decision different from the 2nd Circuit, the Supreme Court could take up the case and determine whether a state could require self-insured employers to provide data without conflicting with ERISA

In the meantime, the outlook on this case is uncertain. Vermont, Connecticut, and New York, the three states in the Second Circuit, are most directly affected by the outcome of the case. All of these states are either implementing or have implemented an APCD that will be subject to this decision. All three states will still have to wait until the Supreme Court decides whether it will grant review, most likely in the next term. If the decision stands, it may prevent these three states from requiring self-insured employer plans to submit data for more than half of individuals enrolled in employer-sponsored plans in their state, according to the most recent data from the Employee Benefits Research Institute. If Federal District Courts in other Circuits choose to follow *Gobeille,* it will also affect other states, by setting a more limiting interpretation of ERISA preemption that could interfere with state activity on APCDs or other reforms. Until we know more, states will be watching and hoping for a speedy and happy end to this journey.